No. 11107

In the United States Circuit Court of Appeals for the Ninth Circuit

JOHN FANNON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR THE APPELLEE

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Assistant Attorney General.

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STATEMENT OF THE CASE

Appellant was indicted in the District Court for the Territory of Alaska, Third Division, for knowingly failing and neglecting to perform a duty required of him under the provisions of the Selective Training and Service Act of 1940, as amended, and the rules and regulations made and directions given thereunder (R. 2). The indictment contained one count and charged that on or about October 30, 1944, appellant, being a registrant under the Selective Training and Service Act of 1940, as amended, with the Local Selective Service Board, Number One, at Kelso, Washington, and a transfer registrant with Local Selective Service Board, Number One, at Anchorage, Alaska, did wilfully, knowingly, feloniously and unlawfully fail and neglect to perform a duty required of him under and in the execution of said Act and the rules and regulations thereunder in that, having

been classified by his local board located at Kelso, Washington, in Class 1–A and having been duly and regularly transferred to the Local Board Number One at Anchorage, Alaska, for induction, and having been theretofore duly ordered and notified by said Board to report for induction at Ft. Richardson, Alaska, on October 30, 1944, pursuant to the powers conferred upon such Board by the aforesaid Act and the regulations thereunder, appellant did wilfully, feloniously, knowingly and unlawfully fail and neglect to report at Ft. Richardson, Alaska, for induction, as he was required to do by said order (R. 2–3). This indictment was returned on March 24, 1945 (R. 4).

Thereafter appellant was tried by a jury and found guilty (R. 28). His two motions for a new trial were denied (R. 76, 80), and he was sentenced to imprisonment for a term of one year and to pay a fine of $2,000 (R. 80).

STATEMENT OF FACTS

Appellant registered with Local Board Number One, Kelso, Washington, on October 16, 1940, pursuant to the Selective Training and Service Act. On April 16, 1941, he was classified 4–F. He received various classifications thereafter (R. 32–33). Subsequently that local board wrote three warning letters to appellant concerning three separate and distinct delinquencies, not including the offense for which he was tried; these letters were dated June 6, 1942, April 10, 1943, and June 14, 1943. The first of these involved failing to submit a change of address; the second was for failure to report for physical examina-

tion; the last was for failure to report for induction (R. 44–47). At some point after registering for selective service, appellant had moved to Alaska where he became employed (R. 40, 98).

After passing a preinduction physical examination, appellant was ordered to report to Room 128, Federal Building, Anchorage, Alaska, for induction on October 30, 1944 (R. 54). Appellant received this notification on October 19, 1944 (R. 55). He entered a private hospital on October 29, 1944 (R. 78) and failed to report for induction on the date specified (R. 48, 55). On November 1, 1944, appellant's attorney notified the local board at Anchorage, Alaska, that appellant was in the hospital at nearby Palmer, Alaska (R. 37–38, 59).

The United States Attorney was notified by the local board that appellant had not reported for induction (R. 57) and, upon learning of his hospitalized status, it was decided that no steps would be taken pending his release from the hospital (R. 62). At some later date appellant was released from the hospital and went to Fairbanks, Alaska, where he was arrested on January 10, 1945 (R. 13). At no time subsequent to the notification of his hospitalized status and prior to his arrest did he contact or report to the draft board nor the prescribed army authorities (R. 56).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to justify submission of the case to the jury.

2. Whether the court erred in admitting testimony to the effect that appellant had committed prior de-

linquencies in connection with the Selective Training and Service Act.

3. Whether error resulted in refusing appellant's requested instruction to the jury pertaining to the element of criminal intent.

4. Whether the court's charge might have misled the jury into convicting appellant for offenses for which he was not indicted.

5. Whether the trial court abused its discretion in overruling appellant's two motions for a new trial.

ARGUMENT

I

The Court was justified in submitting the case to the jury

Appellant has merged several unrelated arguments under his second Assignment of Error but it appears that the principal contentions are as follows: (1) Appellant was in the hospital on October 30, 1944, and was physically unable to report on that date, and (2) the indictment charges that he failed to report at Ft. Richardson, Alaska, as ordered, whereas the order to report for induction directed him to appear at the Federal Building, Anchorage, Alaska. There is no disputing that both of these allegations are factually correct. We submit, however, that neither contention has any merit.

(A) The crux of the crime committed by appellant is not that he failed to report for induction on October 30, 1944, but that he failed to report at any time prior to his arrest at Fairbanks, Alaska, on January 10,

1945. The duty to report is a continuing obligation and obviously does not cease when a selectee fails to report on the specified date.[1] The indictment charges that "* * * on or about the 30th day of October 1944 [defendant] did wilfully * * * neglect to perform a duty * * * to report for induction at Fort Richardson, Alaska, on the 30th day of October 1944 * * *." It states that the offense took place "on or about the 30th day of October." It was necessary to allege it in that way because the duty to report began on October 30, 1944, and continued on thereafter. The offense began at such time as the failure to report became wilful and deliberate.

It can be seen therefore that appellant was not indicted for failure to report at a time when he was hospitalized. It was his failure to report when he became able to do so that formed the offense. In fact the Assistant United States Attorney testified that the United States Attorney had decided that no action would be taken until it was determined that appellant had not reported upon his release from the hospital (R. 62). The date of appellant's release from hospi-

[1] Section 642.15 of the Selective Service Manual, which became effective on November 1, 1943, provides as follows:

"*Continuous duty of certain registrants to report for induction.* Regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction (Form 150) or to report for work of national importance pursuant to an Order to Report for Work of National Importance (Form 50), it shall thereafter be his continuous duty from day to day to report for induction or for work of national importance, as the case may be, to his own local board and to each local board whose area he enters or in whose area he remains."

talization does not appear in the record. But it does reveal that on January 10, 1945, the date of his arrest, he was found in Fairbanks, Alaska (R. 13), which is a considerable distance from Palmer, Alaska, where he was hospitalized. Appellant failed to report to or contact any selective service authority upon his release from the hospital (R. 56). Nowhere did appellant allege that he attempted to contact any authority upon his release from the hospital and prior to his arrest, nor does it appear that he did.

(B) Appellant further contends that, since the indictment alleges a failure to report to Ft. Richardson, Alaska, whereas he was actually directed by the local board to report to the Federal Building in Anchorage, Alaska, this is fatal error. Apparently the contention is that appellant was thus charged with a failure to perform a duty which had not in fact existed.

Perhaps the indictment was inartificially drawn. But it hardly requires argument to prove that this is a formal defect and has therefore been cured by verdict. The error does not go to the gist of the offense, i. e., failure to report for induction; and the fact that an erroneous address was given as the proper place to have reported cannot by any stretch of the imagination render the indictment fatally defective. No attack was made upon the indictment at the proper time and appellant is therefore estopped from an objection to errors of form at this time. *Holmgren* v. *United States,* 217 U. S. 509, 523; *Moore* v. *United States,* 56 F. 2d 794, 795 (C. C. A. 10).

It is submitted that the evidence was sufficient for submission to the jury. A failure to report for induction during the period from October 30, 1944, to January 10, 1945, was shown. The allegation that appellant could not have knowingly and wilfully failed to report because he was hospitalized was entirely disposed of by showing that he failed to perform the continuing duty upon his release from the hospital. As a matter of fact he had left the vicinity and had gone to Fairbanks, Alaska, where he was located and arrested.

II

Appellant was not substantially prejudiced by admission of evidence of prior delinquencies

Appellant contends that reversible error resulted from the admission of evidence disclosing that he committed prior delinquencies. Further, he asserts, the prosecutor's statement in explaining the purpose for which he was introducing such testmony, i. e., that it was intended to show they were a part of a scheme to evade the selective service law (R. 45), was prejudicial to appellant.

It can hardly be said that appellant was substantially prejudiced by this statement. It is well established that evidence of previous similar acts is admissible for the purpose of showing criminal intent. *Weiss* v. *United States,* 122 F. 2d 675, certiorari denied, 314 U. S. 687, rehearing denied, 314 U. S. 716; *King* v. *United States,* 144 F. 2d 729 (C. C. A. 8). Since testimony of this sort is admissible for that purpose, it is plain that the prosecutor's explanatory

remark is immaterial. It is not the remark of the district attorney, but rather the law of evidence, which determines the admissibility of testimony. In addition to this, the court pointed out at that time that appellant had not been indicted for a scheme to evade the law (R. 45). Also, the defense brought out on cross-examination of government witness Ruth Anderson that the previous delinquencies had been cleared up subsequently by appellant (R. 50). Certainly these statements would have eliminated any possibility of prejudice.

The admissibility of the testimony of witness Anderson concerning prior delinquencies should not be construed as prejudicial even though the court did not limit it to the element of criminal intent. Appellant had previously opened this field on cross-examination of the witness by causing her to read a letter in his file in which appellant stated that he was embarrassed and put to expense as a result of being arrested for an earlier delinquency (R. 39–40). The prosecutor obviously felt it incumbent upon him to counteract this attitude of self-righteousness by showing the other delinquencies. It is submitted that appellant cannot later complain of such testimony since the field was opened by him.

III

There was no error in refusing appellant's instruction to the jury on criminal intent

Little need be said of this contention. Appellant states that the trial court erred in not accepting his

requested instruction on criminal intent (R. 72). He does not contend that the court did not instruct the jury adequately on this point. Actually the court's instruction (R. 63–73) gave the established law very clearly and simply. No rule is better settled than that the court is not required to give a charge in the exact language of defendant's request when the court's own language adequately covers the subject. *Winter* v. *United States,* 13 F. 2d 53 (C. C. A. 8); *McAdams* v. *United States,* 74 F. 2d 37 (C. C. A. 8).

Since no harm is alleged and none appears, this assignment of error appears frivolous.

IV

The trial court did not err in its instruction to the jury regarding the time element of the offense charged

Appellant argues that the trial court was in error in instructing the jury that the government must prove, among other things, that "* * * said violation occurred on or about the 30th day of October 1944, or within three years before the finding of the indictment herein" (R. 65). It is said that this instruction may well have caused the jury to believe it was authorized to convict appellant of some offense other than that charged in the indictment, i. e., the prior delinquencies to which Miss Anderson testified.

The law as stated by the court is elementary. In *Gerson* v. *United States,* 25 F. 2d 49, 56 (C. C. A. 8), it was said "If it is shown that the offense was prior

to the indictment and within the statute of limitations it is sufficient. *Bold* v. *United States,* (C. C. A.) 265 Fed. 581; *Goldberg* v. *United States* (C. C. A.) 295 Fed. 447." Nothing in this case would take it out of the general rule; nor does appellant reveal any sound reason for considering it an exception to the general rule.

V

The trial court did not abuse its discretion in overruling appellant's motions for a new trial

Appellant made two separate motions for a new trial (R. 75–80). The first rested on three grounds: (1) Insufficiency of the evidence, (2) error in law occurring during the trial, and (3) newly discovered evidence. This motion was supported by an affidavit made by the attorney who represented appellant at the trial and pertained solely to alleged newly discovered evidence. The second motion was based solely on the grounds of newly discovered evidence and was supported by a more detailed affidavit made by appellant himself. In his brief, appellant addresses his argument on this assignment of error solely to the question of newly discovered evidence. The government will therefore confine itself to this ground.

Appellant states that he learned after his trial that the army medical authorities had been in contact with his private physician on October 30, 1944, and had instructed the physician to continue his treatment of appellant and not to cause his transfer to them, the

army authorities, at Ft. Richardson, Alaska; further, that the army medical officers said it would not be necessary for appellant to report for induction on the day specified, nor for ninety days thereafter.

Apparently the inference sought to be drawn from the above allegations is that they vitiate the wilfullness of appellant's failure to report for induction and thereby negative the necessary criminal intent. But appellant's argument answers itself. If he had no knowledge of the above allegations until after his trial, they could not possibly have had any effect on his failure to report. It therefore does not meet the requirement that such evidence would reasonably and probably change the verdict in this case. *Irvin* v. *Buick Motor Co.,* 88 F. 2d 947 (C. C. A. 8); *Boardman* v. *McKinnon,* 169 Fed. 496 (C. C. A., S. D., N. Y.); see also *Williams* v. *United States,* 137 U. S. 113, 137.

Even if he were not precluded by his own statement, appellant makes no showing that there was the essential abuse of discretion by the trial court in overruling his motions for a new trial.

CONCLUSION

Appellant had a fair and impartial trial and there was sufficient evidence to support the verdict. No reason exists for upsetting the verdict of the jury which heard the evidence presented by the prosecution and the defense and found appellant guilty after having been fully and fairly advised by the trial judge

of the law applicable to the case. We respectfully submit that the judgment of conviction should be affirmed.

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